Supreme Court, U.S.
FILED
MAR 2002

Nº. 011428

In The
Supreme Court of the United States

THE TAYLOR GROUP, AN INDIANA GENERAL PARTNERSHIP, ET AL.,
Petitioner,
v.
ANR STORAGE COMPANY, A MICHIGAN CORPORATION,
Respondent.

Petition For a Writ of Certiorari from the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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March, 2002

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74 pp

QUESTIONS PRESENTED

Does a federal court make an error of law in holding that collateral estoppel bars Plaintiffs' claim when the applicable and controlling state law holds that a prior judgment on the merits is an element of collateral estoppel and the federal court previously determined that the prior state judgment was not a judgment on the merits?

Does a federal court make an error of law and abuse its discretion in denying plaintiffs' motion to amend complaint on the basis that such an amendment would subject the defendant to duplicative discovery?

PARTIES TO THE PROCEEDINGS

Petitioners:

The Taylor Group, An Indiana General Partnership; Charles R. Newman;
Stephen R. Newman;
Marilyn Dodds;
Christine Newman Aumiller;
Irma Newman;
Keith Dempsey;
Carolyn M. Dempsey;
Roland J.W. Linder; Estate Of Ruth Dempsey, Dec'd;
Narlyn D. (Dempsey) Vinyard;
Basil Dempsey;
Bryna M. Dye;
Winifred Y. Blossom;
Ray Bullock;
Kris A. Bullock;
Jeanne L. Bullock;
Jack L. White;
William J. White;
Carol Jane Harshman;
Dee Ann Peterson;
Ken A. Stoops;
Sheryl L. White;
Christine M. (Neideck) Weiss;
Steven P. Neideck;
Robert R. Neideck, Jr.;
Margaret C. Neideck;
Robert R. Neideck;

Lawrence N. Williamson;
Marie E. Williamson; Estate Of Virgil Burkholder, Dec'd;
Alison M. Burkholder;
Carolyn Rose Burkholder;
Joleen M. (Burkholder) Hurt;
Tim Burkholder; Estate Of John Ayers, Dec'd;
John S. Burd;
Patricia A. Burd;
Jim Mathis;
Paul Nussbaum;
Kurt Evan Bullock;
Elmer Nussbaum;
Jeffrey Dempsey;
Erica L. (Dye) Dyeson;
Harold Snyder;
Ellen Snyder;
James A. Snyder;
Marian S. (Snyder) Willey;
The Harold & Ellen Snyder Charitable Remainder Unitrust (Trustee-Spring Arbor College);
The Harold & Ellen Snyder Charitable Remainder Unitrust (Trustee-Free Methodist Foundation);
Ruth E. White;
Clarence A. Snyder;
Arthur H. Snyder.

Respondent:
ANR Storage Company, a Michigan corporation.

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The Taylor Group respectfully requests that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit on the merits is unreported, and is reproduced in App. A1. The decision of the United States Court of Appeals for the Sixth Circuit denying the petition for rehearing is unreported and is re-produced in App. B1. The opinion of the United States District Court for the Western District of Michigan granting Defendant's Motion For Summary Judgment is unreported and is reproduced in App. D1. The Judgment of the United States District Court for the Western District of Michigan is unreported and is reproduced in App. E1. The District Court Order Denying Plaintiffs' Motion To Amend Complaint is unreported and is found at App. F1.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was issued on November 8, 2001. A timely petition for rehearing was denied by that court on December 20, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1). The original cause of action was subject to the federal court jurisdiction by way of federal question

jurisdiction, because it was based upon the Racketeer Influenced and Corrupt Organization Act of 1970, 18 U.S.C. § 1961 *et seq*. The District Court's jurisdiction was invoked under 28 U.S.C. § 1331 and 18 U.S.C. § 1964©).

STATEMENT OF THE CASE

a. STATEMENT OF FACTS

The action, filed on September 2, 1994, was brought pursuant to the Racketeer Influenced and Corrupt Organization Act of 1970, 18 USC § 1961 *et seq*., and sought treble damages, costs, and attorney's fees pursuant to 18 USC § 1964(c).

Plaintiffs' cause of action stems from the 1983 misrepresentations of Defendant associated with its proposal that Plaintiffs sell their mineral rights to Defendant. The Appellants owned approximately 130 acres of surface and minerals in Blue Lake Township of Kalkaska County, Michigan. The Defendant ANR Storage Company, hereafter "ANR" or "Defendant", was in the natural gas storage business. ANR wanted to acquire the Plaintiffs' mineral interest in the Blue Lake 18A field for the purpose of converting the then producing Blue Lake 18A gas field to gas storage.

The concept of gas storage is simple. It is the temporary warehousing of natural gas in the subsurface in the spring and summer months when natural gas is

generally less expensive for later high volume withdrawal and delivery to the market during demand periods, usually in the late fall and winter months. ANR earned most of its revenue by selling the storage space in its storage fields to other entities to store their gas. The storage is ultimately delivered to end-users via a gas pipeline system running through the United States and Canada.

The Blue Lake 18A field was the fifth Kalkaska County gas field purchased by ANR for conversion to gas storage. Plaintiffs had no involvement in the four prior purchases, however, like the four previous fields, the Blue Lake 18A field produced both gas and natural gas condensate. The existence of such condensate production in the Blue Lake 18A field was a fact known to both Defendant and Plaintiffs. Also, like the other four Kalkaska County fields, the Blue Lake 18A was not only a gas condensate field but was a retrograde gas condensate field; a fact known to Defendant, but not to Plaintiffs. Natural gas condensate is a valuable gasoline like liquid.

The retrograde process is central to this litigation. In a non-retrograde gas condensate field, any liquid hydrocarbons or condensate that condenses out of the gas stream does so only once the gas leaves the well, and as such it is all subject to being recovered at the surface when the gas is produced. In a retrograde gas condensate field; however, as the subsurface pressure in the field declines due to production of gas, a point, the dew point, is reached.

Instead of all the vapor being produced to the surface, a portion of the hydrocarbon vapor starts to condense out in the subsurface. As the pressure further declines, a higher and higher proportion of the hydrocarbon vapor condenses out in the subsurface instead of at the surface. This phenomenon is the opposite of what would normally be expected in a gas field as pressure declines and thus the term "retrograde". It is this subsurface retrograde condensate, which is the focus of the fraud perpetrated upon Plaintiffs by ANR.

ANR's offer to purchase was based upon 9.84 billion cubic feet of "remaining gas in place" plus 45,170 barrels of "remaining condensate" subject to being adjusted based upon actual production as of June 1, 1983. Such an adjustment due to prior under-production and a resultant contingent payment was in fact made by early 1984 on the basis of 51,816 barrels of "remaining condensate".

Plaintiffs in 1992 gained information that Defendant in 1983 had misrepresented the value of remaining condensate. A state court fraud action was commenced in 1993.

The evidence garnered during state court discovery indicates that in reality, in excess of 1.3 million barrels of recoverable condensate remained in the Blue Lake 18A field in 1983 and that the Defendant knew this, but misrepresented this fact to Plaintiffs. The evidence also

shows that the understatement to Plaintiffs of remaining condensate was intended by ANR, knowing full well that at least another 1.3 million barrels remained. The evidence also garnered during such discovery indicated that it was Defendant ANR's modus operandi to intentionally under-represent the quantity of remaining condensate in the previous four gas fields in which it had purchased the mineral rights in Kalkaska County when dealing with the owners of such minerals.

B. COURSE OF PROCEEDINGS

Based upon the state Court discovery, the Plaintiffs initiated their cause of action on September 2, 1994 in the United States District Court for the Western District of Michigan, Southern Division. The action, filed on September 2, 1994, was brought pursuant to the Racketeer Influenced and Corrupt Organization Act of 1970, 18 USC Sec. 1961 *et seq.*, and sought treble damages, costs, and attorney's fees pursuant to 18 USC Sec. 1964(c). Plaintiffs allege, pursuant to the RICO statute that Defendant, and other entities Plaintiffs sought to add as parties Defendant, engaged in an open-ended scheme or enterprise to defraud mineral owners of their property.

On October 31, 1994, Defendant filed a Motion To Dismiss And/Or For Summary Judgment. The Defendant's motion was predicated upon the statute of limitations, *res judicata*, and failure to state a RICO claim. The defense of

res judicata was based upon the dismissal of a previous claim filed by the Plaintiffs in the Kalkaska County, Michigan Circuit Court on January 14, 1993. The state court action alleged fraud against the Defendant ANR based upon false representations by ANR that occurred in 1983, as to the volume of natural gas condensate remaining in the Blue Lake 18A field, which remaining condensate was one of the elements of the consideration due Plaintiffs from Defendant ANR for the sale of their minerals to Defendant. The state trial judge had granted the Defendant's motion to dismiss on November 9, 1993.

In the Plaintiffs' original response to the Defendant's motion for dismissal and/or summary judgment dated November 28, 1994, the Plaintiffs requested leave to amend their complaint. Moreover, on January 18, 1995 Plaintiffs filed a Motion To Amend Complaint.

On January 31, 1995 the trial court, the Honorable Benjamin F. Gibson, issued its opinion and order denying the Defendant's Motion To Dismiss And/Or Summary Judgment without prejudice on the bases of prior adjudication and limitation period. The Court indicated in its Opinion of January 31, 1995 that there was an issue of fact as to whether the doctrine of prior adjudication precluded Plaintiffs' action.

On February 15, 1995 the Defendant filed a Renewed Motion To Dismiss And/Or For Summary

Judgment On The Basis Of Prior Adjudication on the basis that the federal RICO claim was *res judicata*, asserting that Plaintiffs had previously litigated the same claim in the state court action.

Subsequently, on June 2, 1995 the federal district court issued its opinion and order of partial judgment granting the Defendant's motion for summary judgment; that is, the order of partial judgment entered by Judge Gibson dismissed all of the Plaintiffs' claims against the Defendant ANR Storage Company (ANR). At the same time, however, on June 2, 1995, the trial court issued an order allowing the Plaintiffs to amend their complaint to name as Defendants: John R. Milam, Michael Whims, John Kobasa, S. Harold Stocker, Donald Ross, Frederick H. Clark, Amoco Production Company, and ANR Pipeline Company.

The Plaintiffs filed the first amended complaint dated June 7, 1995 but never served any of the newly named Defendants. Plaintiffs filed a notice of appeal on June 29, 1995. This notice of appeal was dismissed by the United States Court of Appeals for the Sixth Circuit by mandate of August 24, 1995 whereby that Court held that Judge Gibson's order of partial judgment dated June 2, 1995 was not a final appealable order pursuant to 28 USC Sec. 1281.

On August 31, 1995, the Plaintiffs filed a motion for certification of order, or in the alternative dismissal. On September 22, 1995 the trial court entered an order of dismissal, dismissing without prejudice all newly named Defendants. Plaintiffs filed a notice of appeal with the Federal District Court on October 17, 1995.

After briefs were filed with the Sixth Circuit Court of Appeals and shortly before oral argument before that Court, the Michigan Supreme Court on July 23, 1996, reversed the Michigan Court of Appeals and the state trial court and remanded the state matter back to the state trial court. Thereupon, the Sixth Circuit Court of Appeals remanded the instant case back to the Federal District Court for further proceedings.

After the Status Conference in the remanded proceedings, Plaintiffs proceeded to file a Second Amended Complaint naming the instant Defendant and eight (8) additional Defendants. After the magistrate judge issued an order dated January 6, 1997 postponing a Rule 16 Scheduling Conference until after answers to the Second Amended Complaint were received by Plaintiffs and the Plaintiffs had informed the Court by letter of the death of Defendant S. Harold Stocker, Defendant ANR, on March 11, 1997, filed an Answer and Affirmative Defenses to Plaintiffs' First Amended Complaint and also filed a Motion to Strike or Dismiss Plaintiff's Second Amended Complaint.

After a Hearing on April 3, 1997 before Magistrate Judge, Hugh W. Brenneman, Jr., on Defendant's Motion, the Magistrate issued an Order dated April 10, 1997 granting Defendants' Motion to Strike or Dismiss Plaintiffs' Second Amended Complaint.

Thereafter, on April 30, 1997, Plaintiffs filed a Motion For Leave To Be Allowed To File A Third Amended Complaint. With the motion, Plaintiffs also filed a Proposed Third Amended Complaint and Demand For Jury Trial.

After a Hearing on May 27, 1997, before the Magistrate Judge, the Judge, by Order dated June 30, 1997, denied Plaintiffs' Motion For Leave To Be Allowed To File Third Amended Complaint.

Meanwhile, on June 9, 1997, Plaintiffs filed a Motion To Amend Complaint and a Proposed Third Amended Complaint naming the Defendant ANR and six (6) additional Defendants.

After a Hearing before the Magistrate Judge on Plaintiffs' Motion To Amend Complaint, the Magistrate Judge issued an Order entered on July 21, 1997, denying Plaintiffs' Motion To Amend Complaint.

On August 1, 1997, Plaintiffs filed objections to Judge Magistrate Brenneman's Order denying Plaintiffs'

Motion To Amend Complaint. Senior Judge Benjamin F. Gibson, by Memorandum, Opinion And Order dated October 6, 1997 affirmed the decision of the Magistrate Judge denying Plaintiffs' Motion To Amend Complaint.

On August 17, 1997 the state trial court granted Defendant a Motion For Summary Disposition[1], based in part upon the statute of limitations for a common law fraud claim. On September 30, 1997 Defendant ANR filed a Motion For Summary Judgment On The Basis Of Prior Adjudication. The Trial Court issued an Opinion and Judgment granting Defendant's motion and dismissing Plaintiffs' case.

Plaintiffs appealed to the Sixth Circuit Court of Appeals as a matter of right the Judgment entered by the Honorable Benjamin F. Gibson on May 7, 1998 which Judgment was based upon the Trial Court's Opinion of the same date. The basis for the district court granting the Defendant's Motion For Summary Judgment was "prior adjudication" or *res judicata* based upon the earlier state court order entered in the Kalkaska County (Michigan) Circuit Court, after a hearing on August 22, 1997 and a formal order of the same date.

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[1] Summary Disposition pursuant to Michigan Court Rule 2.116 is similar to Summary Judgment per Fed R.Civ. P. 56

In its November 8, 2001 Opinion, the United States Court of Appeals for the Sixth Circuit upheld the Judgment of the District Court, but for different reasons than those stated in the District Court Opinion. App. A1. The Sixth Circuit held that the prior state court judgment lost its preclusive effect following the appeal of the state court judgment because the Michigan Court of Appeals only upheld the judgment on the basis of the statute of limitations, a basis which does not meet the merits of the case. Under Michigan law, a prior decision loses its preclusive effect if it is affirmed on appeal on grounds which do not reach the merits. App. A1.

However, the Sixth Circuit upheld the District Court Judgment because the Sixth Circuit found that the Plaintiffs' claims were barred under the doctrine of collateral estoppel. App. A1. Specifically, the Sixth Circuit found that the Michigan Court of Appeals, in upholding the state court judgment on the basis of the statute of limitations, had also found that under the discovery rule Plaintiffs unreasonably relied upon Defendant's initial representations regarding the amount of natural gas condensate remaining in the Blue Lake 18A Field. App. A1. The Sixth Circuit went on the state that reasonable reliance upon a predicate act of mail fraud and wire fraud was an essential element of a RICO claim. App. A1. The Sixth Circuit found that Plaintiffs were collaterally estopped from contesting the Michigan Court of Appeals finding that Plaintiffs had unreasonably relied

upon the Defendant's representations and that, "unlike the doctrine of *res judicata*, a prior judgment on the merits is not an element of collateral estoppel." App. A1. On this basis, the Sixth Circuit upheld the District Court.

REASONS FOR GRANTING THE WRIT

A. THAT THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH A CONTROLLING DECISION OF THE MICHIGAN SUPREME COURT.

This Court, in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481-482; 102 S.Ct. 1883, 1897; 72 L.Ed.2d 262 (1982) explains the meaning and importance of the full faith and credit statute, 28 U.S.C. § 1738 as follows:

> It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken.

Id. In other words, this Court has unequivocally held that the United States Court of Appeals for the Sixth Circuit must follow Michigan law regarding collateral estoppel in determining whether Plaintiffs are collaterally estopped from relitigating the issue of whether Plaintiffs unreasonably relied upon the fraudulent representations of Defendant for purposes of the RICO statute. Michigan law states that a prior state court decision must be a judgment on the merits in order for collateral estoppel to apply to a prior decision. The United States Court of Appeals for the Sixth Circuit in this case has previously held that the state court judgment was not a decision on the merits because the Michigan Court of Appeals only upheld the state trial court decision on the basis of the statute of limitations, thereby depriving the decision of preclusive effect. *See, Amalgamated Transit Union, Local 1564 v. Southeastern Michigan Transp. Auth.*, 437 Mich 441; 473 N.W.2d 249, 255 (Mich 1991). Therefore, the prior state court decision has no preclusive effect and the decision of the Sixth Circuit must be reversed by this Court.

The Michigan Supreme Court in *City of Detroit v. Qualls*, 434 Mich 340; 454 N.W.2d 374 (Mich. 1990) ruled that a prior judgment must be a judgment on the merits in order to trigger the doctrine of collateral etoppel on relitigation. *Id.* In *Qualls*, the Plaintiff City of Detroit initially brought suit against defendant for foreiture of

fireworks seized from the defendant's premises alleging defendant's license only permitted him to sell and store legal fireworks in amounts of one hundred pounds or less. *Id.* at 345. The defendant argued that the ordinance was preempted by state law, but the trial court held that the ordinance was valid and judgment was entered against the defendant. *Id.* at 346-347. In a later case the city charged the defendant with misdemeanor violations concerning the storage provisions in the fireworks ordinance. *Id.* at 347. The defendant again raised the issue of the conflict of the ordinance with state law. *Id.* at 348. In holding that the defendant was not precluded from raising the issue of the validity of the ordinance in a prior proceeding, the Michigan Supreme Court stated in footnote 27 of that opinion:

> A judgment is considered a determination of the merits, and thereby triggers the doctrine of collateral estoppel on relitigation, even if the action has been resolved by a summary disposition, *see,* e.g., *Detroit v. Nortown Theatre, Inc*, 116 Mich App 386; 323 NW2d 411 (1982). In fact,
>
> '[i]t would be strange indeed if a summary judgment could not have collateral estoppel effect. This would reduce the utility of this modern device to zero . . . . Indeed, a more positive adjudi-cation is hard to imagine.' [18 Wright, Miller & Cooper, Federal Practice & Procedure, § 4444, p 392, n 2, citing *Exhibitors Poster Exchange, Inc v National*

Screen Serv Corp, 421 F2d 1313, 1319 (CA 5, 1970).]

Thus, it is not surprising that the dissent fails to cite any legal authority whatsoever to support this strange contention, and we believe the Court should continue to recognize that, for purposes of collateral estoppel, a ruling rendered on a summary judgment motion will be considered a final disposition on the merits.

Id. at 356, n. 27 (emphasis supplied).

Michigan courts have held that in order to have a prior adjudication that was actually litigated and therefore entitled to preclusive effect under the doctrine of collateral estoppel, there must be an adjudication on the merits. As the Michigan Court of Appeals ruled in *Latimer v. Wm Mueller & Son* 149 Mich App 620, p 641; 386 N.W.2d 618 (1986):

Thus, like a directed verdict after the close of proofs or a motion for summary judgment for failure to state a cause of action, a directed verdict after opening statement, in our view, is a judgment on the merits of an issue actually litigated and is thus entitled to collateral estoppel effect. See 1 Restatement Judgments, 2d, § 27, Comment d, p 255; 46 Am Jur 2d, Judgments, § 515, pp 667-668.

Id. (emphasis supplied)

Finally, the Michigan Court of Appeals in an unpublished opinion, *Crumm v. Addison Community Hospital* 1999 WL 33327162, p 2 (Mich. App.) stated as follows:

> We further conclude that plaintiff is not collaterally estopped from bringing a medical malpractice action against the Crumm III defendants. Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid judgment and the issue was actually and necessarily determined in that prior proceeding. *McMichael v. McMichael*, 217 Mich. App 723, 727; 552 NW2d 688 (1996). Because collateral estoppel requires that the issue have been actually determined, judgment on the merits must have been rendered in the first action to prelude relitigation of the issue in the second action. *Detroit v. Qualls*, 434 Mich. 340, 356 n 27; 454 NW2d 374 (1990); *Latimer v. William Mueller & Son, Inc*, 149 Mich. App 620, 640; 386 NW2d 618 (1986). Because the record does not establish that *Crumm I* resulted in an adjudication on the merits of a medical malpractice claim against the *Crumm III* defendants, we hold that collateral estoppel does not preclude plaintiff's claims in *Crumm III*.

Id. (emphasis supplied). Therefore, it is clear that Michigan law demands that a prior adjudication be made on the merits in order for the doctrine of collateral estoppel to apply to bar Appellants' claims. The United States Court of Appeals for the Sixth Circuit has already determined that

the prior state court ruling was not a judgment on the merits and therefore the United States Court of Appeals for the Sixth Circuit committed legal error in upholding the judgment of the United States district Court for the Western District of Michigan.

B. THAT THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ABUSED ITS DISCRETION IN DENYING APPELLANTS' MOTION TO AMEND COMPLAINT ON THE BASIS THAT SUCH AN AMENDMENT WOULD SUBJECT THE DEFENDANT TO DUPLICATIVE DISCOVERY.

The United States Court of Appeals for the Sixth Circuit upheld the trial court's July 21, 1997 Order denying Plaintiffs' Motion To Amend Complaint which named the Defendant and six additional defendants. App. A1. The Sixth Circuit based its ruling on its assertion that:

> Although Defendant ANR and Plaintiffs had stipulated to use the discovery from the state proceeding, the proposed new defendants would have to repeat the discovery process because they were not parties to the proceeding. This would have prejudiced ANR by subjecting it to repeated discovery. Further, one of the key witnesses, the

App. A1.

The Sixth Circuit has abused its discretion in making such a ruling because that court has already determined that duplicative discovery, even when combined with undue delay, does not justify the denial of a Motion To Amend. *Janikowski v. Bendix Corporation*, 823 F.2d 945 (6 Cir. 1987)

As the Sixth Circuit ruled in Janikowski:

> On July 10, 1985, the court declined to grant leave to amend, indicating that the defendant would be prejudiced by the additional and duplicative discovery the amendment would have required, and stressing that the plaintiff had not furnished any reason for the delay in proffering the new theory.
>
> [5] Rule 15(a), Fed. R. Civ. P., provides that leave to amend shall be "freely given" when justice so requires. The thrust of the provision "is to reinforce the principle that cases should be tried on their merits rather than on the technicalities of pleadings." Tefft v. Seward, 689 F.2d 637, 639 (6th Cir. 1982). Delay that is not intended to harass the defendant is not in itself a permissible reason to refuse leave to amend. *Id.*, at 639, n. 2. Furthermore, there must be "at least some significant showing of prejudice to the opponent" if the motion is to be denied. Moore v. City of

Paducah, 790 F.2d 557, 562 (6th Cir.1986). Although this court reviews denials of leave to amend only for abuse of discretion, it should be emphasized that the case law in this Circuit manifests "liberality in allowing amendments to a complaint." *Id.*

In this instance there is simply no showing of prejudice to Bendix sufficient to preclude plaintiff from introducing his contract claim. In the brief Bendix filed with the district court opposing the motion for leave to amend, the only claim of prejudice was that "Bendix would ... be put to the expense of conducting a second round of discovery including re-deposing Plaintiff."

. . .

Although prejudice has been found in cases where the motion for leave to amend was filed after completion of discovery, Roberts v. Arizona Board of Regents 661 F.2d 796, 798 (9th Cir.1981); Addington v. Farmer's Elevator Mutual Insurance Co., 650 F.2d 663, 667 (5th cir.) cert. denied, 454 U.S. 1098, 102 S.Ct. 672, 70 L.Ed.2d 640 (1981), no such fact pattern is present here. <u>The proper remedy for subjecting Bendix to duplicative discovery would be to require the amending party to bear a portion of the additional expense.</u> Local 783, Allied Industrial Workers of America, AFL-CIO v. General Electric Co., 471 F.2d 751, 756 (6th Cir.), cert. denied, 414 U.S. 822, 94 S.Ct. 120, 38 L.Ed.2d 55 (1973).

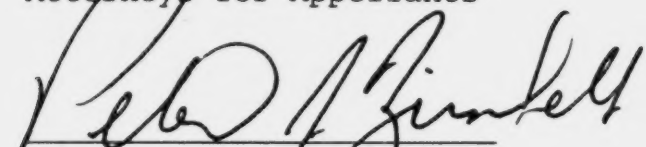
Id. at 951, 952). At worst, the Sixth Circuit should have reversed the decision of the trial court denying Appellants' motion to amend and required the Appellants to pay for the cost of any unfair duplicative discovery. The Sixth Circuit ignored its precedent in this matter and abused its discretion in upholding the trial court.

Additionally, the Sixth Circuit's mention of a "key witness" that had died is irrelevant to the decision to deny Appellant's motion to amend. This witnesses' name is S. Harold Stocker. Mr. Stocker was not a Defendant and not an employee of Appellee ANR, but a former employee of proposed Defendant Amoco Production Company. In addition, as the Sixth Circuit states, Mr. Stocker was merely the author of an opinion letter dated May 19, 1983 subsequent to Plaintiffs' acceptance of Defendant's offer, regarding the "fairness of ANR's offer in 1983." It is Appellee ANR's misrepresentations to Appellants that is at issue in the Sixth Circuit's Opinion and there is no evidence that Mr. Stocker's death will prejudice the Appellee ANR. The Sixth Circuit abused its discretion in denying the Appellant's motion to amend its complaint and this Court should reverse the Sixth Circuit accordingly.

CONCLUSION

The petition for a writ of certiorari should be granted.

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NOT FOR PUBLICATION

No. 98-1 671

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE TAYLOR GROUP, et al,
Plaintiffs-Appellants,

v.

ANR STORAGE COMPANY,
Defendant-Appellee.

On Appeal From The United States District Court
For The Western District of Michigan

BEFORE: JONES, SUHRHEINRICH, and DAUGHTREY, Circuit Judges.

SUHRHEINRICH, Circuit Judge: Plaintiffs appeal the grant of summary judgment in favor of Defendant ANR Storage Company ("ANR") on Plaintiffs's RICO claim under 18 U.S.C. §§ 1961-1968. The district court granted summary judgment to Defendant after finding that Plaintiffs were barred by *res judicata* from asserting this claim because of a prior adjudication in Michigan state court in an action in which they could have brought this claim. Plaintiffs argue that (1) *res judicata* does not apply because the prior state suit was not adjudicated on its merits but on the basis of a statute of limitations; (2) *res judicata* does not apply because ANR did not object to Plaintiffs' failure to join claims, as required under state law; (3) *res judicata* does not apply because the

issues in this case are not identical to those in the prior state action; and (4) the court abused its discretion in denying Plaintiffs' motion to amend their Complaint. We **AFFIRM** the judgment of the district court.

I. BACKGROUND

Plaintiffs are the Taylor Group and about fifty other people or their estates or trusts that purchased property in Kalkaska County, Michigan, around 1970. After natural gas was discovered in the area, the Taylor Group received about $40,000.00 per month for several years in royalties. As the natural gas reservoir began to be depleted, Defendant ANR became interested in using it as a storage reservoir. In 1983, ANR began acquiring mineral and storage rights from some of the owners. Plaintiffs, after seeking the advice of their well operator, accepted ANR's offer and received payment.

ANR's plans to convert the reservoir to a storage facility were indefinitely delayed when the Federal Energy Regulatory Commission ("FERC") refused to approve the project. However, later in 1991, ANR again applied for and received FERC certification. ANR then resumed negotiating with the owners of the remaining mineral rights, who had not sold their interests in 1983.

When Plaintiffs learned of ANR's renewed negotiations, they complained to ANR that it should have calculated its 1983 offer to them to reflect additional gas condensate present in the field, which they claimed that ANR knowingly failed to disclose in 1983.

On January 14, 1993, Plaintiffs sued ANR in state court alleging that ANR defrauded them in 1983 by misrepresenting to them the amount of natural gas condensate remaining in the reservoir. The state court granted ANR's motion to dismiss on February 7, 1994. On September 2, 1994, Plaintiffs sued ANR in federal district court alleging that ANR and other entities violated the Racketeering Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §§ 1961-1968, by using the United States postal service in an open-ended scheme or enterprise to defraud mineral owners of their property, thereby violating RICO.

Defendant moved for summary judgment on October 31, 1994, contending that (1) the statute of limitations barred the RICO action, (2) *res judicata* barred the RICO action, and (3) Plaintiffs had failed to state a RICO claim. The district court denied the motion because a genuine issue of material fact existed as to whether *res judicata* barred the action. Plaintiffs claimed that they learned of their RICO claim during discovery in the state case but could not raise it because the state trial court did not allow them to amend their pleading.

On February 15, 1995, Defendant again moved for summary judgment claiming that *res judicata* barred Plaintiffs' RICO claim and submitted additional briefing and documentary evidence as to Plaintiffs' knowledge of its potential RICO claim. On June 2, 1995, the district court granted Defendant's motion for summary judgment based on the additional briefing and documentary evidence. However, the district court also permitted Plaintiffs to amend their Complaint and add new Defendants.

On June 7, 1995, Plaintiffs filed their amended complaint adding new Defendants but did not serve them. Rather, on June 29, 1995, Plaintiffs appealed the summary judgment. This Court dismissed the appeal on August 24, 1995, finding that the order was not a final appealable order. on August 31, 1995, Plaintiffs voluntarily dismissed the Defendants that they had added on June 7, 1995, but never served, in order to appeal the summary judgment as a final order.

Meanwhile in state court, the Michigan Court of Appeals had affirmed the trial court's dismissal of Plaintiffs's claim. But on July 23, 1996, the Michigan Supreme Court reversed the appellate court and remanded the case to the trial court. Thereupon, this Court also remanded this case to the district court for further proceedings. After a status conference in the district court, Plaintiffs filed a Second Amended Complaint, naming ANR and eight additional Defendants.

On April 30, 1997, and on June 9, 1997, Plaintiffs moved for leave to file a Third Amended Complaint, which the district court denied on July 2, 1997, and July 21, 1997, respectively. On September 16, 1997, the state trial court dismissed Plaintiffs' case because (1) fraud could not be shown under Michigan law since ANR owed no legal duty to disclose all information in its possession pertinent to the Plaintiffs' reservoir; (2) ANR did nothing to hinder Plaintiffs from obtaining an independent appraisal; and (3) Plaintiffs' claim was barred by the statute of limitations. Based on the dismissal of the state case, ANR again moved for summary

judgment in the federal case on the basis of *res judicata*. On May 7, 1998, the district court granted summary judgment to ANR.

Meanwhile, Plaintiffs appealed the dismissal of their claim in state court. After the district court had granted Defendant summary judgment, the Michigan Court Appeals affirmed the circuit court - but only on the grounds of the statute of limitation. Plaintiffs applied for leave to Michigan Supreme Court, which denied leave.

II. DISCUSSION

Plaintiffs raise four issues on appeal. Three of the issues involve prior adjudication. A fourth deals with their attempt to amend their complaint.

A. Prior Adjudication

State judgments "have the same full faith and credit" in federal courts as "they have by law or usage in the courts of such state." 28 U.S.C. §1738. Further, "when state-federal jurisdiction is concurrent on the federal Claim, the law of the state in which an earlier judgment is rendered governs its preclusive effect on factual issues raised in a subsequent federal action." *Kaufman v. BDO Soidman*, 984 F.2d 182, 183 (6th Cir. 1993). In Michigan, claim preclusion bars a subsequent action when (1) the prior action was decided on the merits, (2) the claim in the subsequent action was resolved in the prior action, or arose from the same transaction and could have been resolved in the prior action, and (3) both actions involve the same parties or their privies. *Bd. of County Rd. Comm'rs v. Schultz*, 521 N.W.2d 847, 850 (Mich.

Ct. App. 1994). Actions arise from the same transaction if the same facts or evidence are essential to the maintenance of the two actions. *Schwartz v. City of Flint*, 466 N.W.2d 357, 360 (Mich. Ct. App. 1991).

Plaintiffs contend that the district court improperly dismissed their suit on the basis of *res judicata* for three reasons: (1) the prior state action was not decided on the merits; (2) the instant action and the prior state action arose from different transactions; and (3) ANR waived its *res judicata* defense by failing to request joinder of claims in the state proceeding under Michigan Court Rule 2.203(A)(2).

We observe that initially the federal district court properly granted summary judgment to Defendant on the basis of *res judicata* when it relied on the prior judgment of the state trial court. The state trial court had found for Defendant both on the merits of Plaintiffs' claims and on the basis of the statute of limitations. However, under Michigan law a prior decision may lose its preclusive effect if it is affirmed on appeal solely on grounds that are not on the merits. *Amalgamated Transit Union, Local 1564 v. Southeastern Michigan Transp. Auth.*, 473 N.W.2d 249, 255 (Mich. 1991); *see* also 18 *James Wm. Moore et al.*, Federal Practice ¶ 131 .30[2][c][iii] (3d ed. 2001). Further, under Michigan law, a decision on the basis of the statute of limitations is not a decision on the merits. *Bd. of County Rd. Comm'rs v. Schultz*, 521 N.W.2d 847,850 (Mich. Ct. App. 1994).

Here, the Michigan Court of Appeals limited its review of Plaintiffs' appellate issues to the statute of limitation and affirmed the trial court solely on the basis of

the statute of limitations. *Taylor Group v. ANR Storage Co.*, No. 206534, slip op. at 4 (Mich. Ct. App. July 13, 1999), *leave denied, Taylor Group v. ANR Storage Co.*, 622 N.W.2d 524 (Mich. 2000). Thus, the state court judgment lost its preclusive effect on appeal because it was no longer decided on the merits. Accordingly, *res judicata* does not bar Plaintiffs' RICO action in federal court. Because we have decided that *res judicata* does not apply on this basis, we need not discuss Plaintiffs other two arguments.

Nevertheless, on a close reading of the Michigan Court of Appeals' opinion, we find that another doctrine of prior adjudication, collateral estoppel, applies and precludes relitigation of the fact and time of Plaintiffs' unreasonable reliance on Defendant's alleged mail and wire fraud. The adjudicated fact that Plaintiffs' reliance was unreasonable precludes a finding of Plaintiffs' reasonable reliance on Defendant's alleged mail and wire fraud, which is an essential element of Plaintiffs' RICO claim. The adjudicated fact that Plaintiffs reasonably should have known of this alleged misrepresentation in 1983, also time-bars Plaintiffs' RICO claim as outside of RICO's four-year limitation period. Although the parties did not brief this issue, we may affirm a grant of summary judgment for different reasons than those set forth in the district court if the alternative grounds have adequate support in the record. *Babcock & Wilcox Co. v. Arkwtight-Boston Mfg. Mut. Ins. Co.*, 53 F.3d 762, 767 (6th Cir. 1995).

Collateral estoppel balances judicial economy, i.e., "the need to eliminate repetitious and needless litigation," and the interests of litigants in a "full and fair adjudication "of their claims. *Storey v. MeUer, Inc* ., 429 N.W.2d 169, 171

(Mich. 1988); *Howell v. Vito's Trucking & Excavating Co.*, 191 N.W.2d 313, 318-19(Mich. 1971); *Senior Accountants, Analysts & Appraisers Assoc. v. Detroit*, 249 N.W.2d 121, 124-25 (Mich. 1976). Specifically, issue preclusion "precludes relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *People v. Gates*, 452 N.W.2d 627, 630 (Mich. 1990); *McMichael v. McMichael* , 552 N.W.2d 688,690 (Mich. Ct. App. 1996); *Porter v. Royal Oak*, 542 N.W.2d 905, 908 (Mich. Ct. App. 1995). Unlike *res judicata*, a prior judgment on the merits is not an element of collateral estoppel. The issue in the second action must be the same issue as in the first action. Detroit v Quails, 454 N.W.2d 374 (Mich. 1990); *Wilcox v Sealey* , 346 N.W.2d 889 1984). Further, the issue in the first action must have been essential to the resulting judgment. If the judgment did not depend on resolving that issue, collateral estoppel does not apply. *Quails*, 454 N.W.2d at 391; *People v Gates* , 452 NW2d at 639 (1990). Also, collateral estoppel generally requires mutuality. *Howell v. Vito's Trucking & Excavating Co.*, 191 N.W.2d 313, 315-16 (Mich. 1971); *Barrow v. Pritchard*, 597 N.W.2d 853, 855-56 (Mich. Ct. App. 1999). Collateral estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him. *Howell*, 191 N.W.2d at 315.

A RICO claim requires proof of two or more predicate offenses that formed a pattern of racketeering activity and involved an enterprise that was connected to the racketeering activity, which injured a plaintiffs business or property. 18 U.S.C. § 1961-1964; *VanDen Broeck v. Commonpoint*

Mortgage Co., 210 F.3d 696,699(6th Cir. 2000). Section 1961(1) defines racketeering activity to include mail fraud and wire fraud. 18 U.S.C. §§ 1341, 1343. Plaintiffs allege mail fraud and wire fraud as the predicate acts for their RICO claim. Mail fraud and wire fraud require showing a scheme to defraud using either a mailing or a wire communication to execute the scheme. 18 U.S.C. §§ 1341, 1343. Under RICO, an element of both mail fraud and wire fraud is reliance on the fraudulent representation. *VanDen Broeck*. 210 F.3d at 701; *Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n*, 176 F.3d 315, 321-323 (6th Cir. 1999); *Kenty v. Bank One, Columbus, N.A.*, 92 F.3d 384, 389-90(6th Cir. 1996); *Central Distrib. of Beer, Inc. v. Conn*, 5 F.3d 181, (6th Cir. 1993); *Blount Fin. Servs., Inc. v. Walter E. Heller & Co.*, 819 F.2d 151, 152 (6th Cir.1987).

In affirming the state circuit court's ruling that the statute of limitation had run on Plaintiffs' fraud claim, the Michigan Court of Appeals found that under the discovery rule, Plaintiffs should have known in June 1983 that Defendant's representations were fraudulent because their reliance on the representations were not reasonable. In rejecting Plaintiffs' arguments, the Michigan Court of Appeals reasoned as follows:

> We agree with the trial court that plaintiffs, through the exercise of reasonable diligence, should have discovered that they had a cause of action against defendant in June 1983. . . . [T]he question is not whether plaintiffs were actually induced by Ross not to verify the accuracy of defendant's estimate of the value of plaintiffs' mineral rights, rather, whether their reliance on Ross' representations was reason-able

> under the circumstances of this case. In our opinion, the exercise of reasonable diligence should have caused plaintiffs to seek an independent appraisal of the volume of natural gas condensate remaining in their own property, notwithstanding the representation of Ross.

Taylor Group v. ANR Storage Co., No. 206534, slip op. at 4 (Mich. Ct. App. July 13, 1999).

This finding satisfies all the elements of collateral estoppel. In order to affirm the state circuit court on the basis of the statute of limitations, the Michigan Court of Appeals had to review when Plaintiffs' claim accrued, which in this case occurred when Plaintiffs reasonably should have known of their alleged claim against Defendant. The issue when Plaintiffs reasonably should have known of their claim was actually litigated and necessarily determined by the state courts in finding that the statute of limitations barred Plaintiffs' claim. Further, this finding was part of a final judgment of the state trial and appellate courts on which the Michigan Supreme Court denied leave. Moreover, the judgment appears valid in all respects. Finally, as a party to that action, Defendant would have been bound by the decision had it been decided Plaintiffs' favor. Accordingly, as a matter of collateral estoppel, Plaintiffs did not reasonably rely on Defendant's allegedly fraudulent representations and should have known of their potential RICO claim in 1983. Therefore, Plaintiffs cannot show in the present case that they reasonably relied on Defendant's alleged fraudulent conduct for purposes of their RICO claim, which is an essential element of their RICO claim. Therefore, we **AFFIRM** the

summary judgment of district court, but on different grounds than the district court relied used.

We also find that, just as Plaintiffs' state law fraud claim was barred by the statute of limitations, so is their RICO claim. A civil RICO action has a four-year limitation period. *Rotella v. Wood*, 528 U.S. 549 (2000); *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987). The limitations period for RICO claims accrues when a plaintiff knew or should have known of an injury. *Rotella*, 528 U.S. at 554-55.[1] As the Michigan Court of Appeals determined, "[w]e agree with the trial court that plaintiffs, through the exercise of reasonable diligence, should have discovered that they had a cause of action against defendant in June 1983." Applying the four-year statute of limitations to Plaintiffs' RICO claim requires that Plaintiffs would have had to file their RICO claim by June of 1987. However, Plaintiffs did not file their RICO claim until 1994, well after the statute of limitations had run. Accordingly, their RICO claim is time barred. Therefore, we also AFFIRM the summary judgment of district court on another basis than that relied on by the district court.

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[1]Before *Rotella*, this Circuit applied the "injury and pattern discovery rule," under which a civil RICO claim accrues only when the claimant discovers, or should discover, both an injury and a pattern of RICO activity. *See, e.g., Caproni v. Prudential Securities, Inc.*, 15 F.3d 614, 619-620 (6th Cir. 1994). Application of the injury and pattern discovery rule would not have delayed the accrual of the statute because discovery of Ross' alleged misrepresentation would have implicated the alleged pattern of racketeering activity.

B. Denial of Leave to File Third Amended Complaint Was Proper

Plaintiffs also claim that the district court erred by denying their motion for leave to file a Third Amended Complaint. The Third Amended Complaint proposed adding the same defendants that Plaintiffs had voluntarily dismissed in order to create a final, appealable order. We review a district court's denial of a motion to amend for abuse of discretion. *Greenberg v. Life Ins. Co. of Va.*, 177 F.3d 507, 522 (6th Cir. 1999).

Under Fed R. Civ. P. 15(a), leave to amend shall be "freely given when justice so requires." Courts construe Rule 15(a) liberally. *Janikowski v. Bendix Corp.*, 823 F.2d 945, 951 (6th Cir. 1987). Rule 15(a) reinforces "the principle that cases should be tried on their merits rather than on the technicalities of pleadings." *Id.* (quoting *Teffi v. Seward*, 689 F.2d 637, 639 (6th Cir.1982)). Nevertheless, this Court may affirm a denial of a motion to amend a pleading where there is undue delay, bad faith, dilatory motive, undue prejudice, repeated failure to cure deficiencies in the pleading, or futility of the amendment. *Foman v. Davis*, 371 U.S. 178,182(1962); *Troxel Mfg. Co. v. Schwinn Bicycle Co.*, 489 F.2d 968, 970 (6th Cir. 1973).

Here, after litigating in state court, Plaintiffs filed in federal court. Then almost three years after filing their initial Complaint, which they had already amended twice, they moved for leave to file their proposed Third Amended Complaint. This delay would have prejudiced Defendant.

While substantially the same as their First Amended Complaint, Plaintiffs' Third Amended Complaint adds defendants that they had previously voluntarily dismissed. Although Defendant ANR and Plaintiffs had stipulated to use the discovery from the state proceeding, the proposed new defendants would have to repeat the discovery process because they were not parties to the state proceeding. This would have prejudiced ANR by subjecting it to repeated discovery. Further, one of the key witnesses, the author of an opinion letter on the fairness of ANR's offer in 1983, had died. After considering this protracted proceeding and its consequent prejudice, we cannot find that the district court abused its discretion in denying Plaintiffs' motion for leave to file a Third Amended Complaint.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

Case No: 98-1671

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

O R D E R

THE TAYLOR GROUP, et al.
Plaintiffs - Appellants,

v.

ANR STORAGE COMPANY,
Defendant - Appellee.

BEFORE: JONES, SUHREINRICH, and DAUGHTREY, Circuit Judges

Upon consideration of the petition for rehearing filed by the appellants.

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED.**

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 98-1671

Filed December 28, 2001

THE TAYLOR GROUP, et al.,

Plaintiffs - Appellants,

v.

ANR STORAGE COMPANY,

Defendant - Appellee.

MANDATE

Pursuant to the court's disposition that was filed 11/8/01 the mandate for this case hereby issues today.

A True Copy.

COSTS: **NONE**

Attest:

Filing Fee.....$
Printing .....$
Total .....$

/s/_____
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE TAYLOR GROUP; et al,
Plaintiffs, **File No. 1:94-CV-600**
The Honorable
v. **Benjamin F. Gibson**

ANR STORAGE COMPANY, **OPINION**
Defendant.

/

This is an action under the Racketeering Influenced and Corrupt Organization Act of 1970, 18 U.S.C. SS 1961, *et seq*. ("RICO"), in which plaintiffs allege that defendant ANR Storage Company ("ANR"), a natural gas storage company, defrauded plaintiffs of the value of their mineral rights by misrepresenting the amount of gas condensate recoverable from plaintiffs' property. Before the Court is defendant's motion for summary judgment. Defendant argues that prior adjudication bars plaintiffs' claim. For the following reasons, the Court will grant defendant's motion.

I.

After plaintiffs filed their RICO action in this Court on September 2, 1994, defendant requested summary judgment, contending that the action was barred by a grant of summary disposition in plaintiffs' common-law fraud action against defendant in state court. On January 31, 1995, the

Court denied defendant's motion without prejudice. Upon further briefing, the Court found that no genuine issue of fact existed and granted defendant's renewed motion for summary judgment on June 2, 1995.

Thereafter, the Michigan Supreme Court reversed the Order granting summary disposition in the state court action. Accordingly, the Sixth Circuit Court of Appeals vacated this Court's June 2, 1995, Order granting summary judgment, since that Order was based upon the state court's grant of summary disposition. Defendant filed another motion for summary disposition in state court and on August 22, 1997, the state court granted defendant's motion and entered judgment for defendant in the state common-law fraud case. Defendant now requests that the Court enter summary judgment in its favor based upon the state court's August 22, 1997, Order.

II.

Plaintiffs oppose defendant's motion on two grounds, both of which the Court addressed in its June 2, 1995, Opinion granting defendant's previous motion for summary judgment based on prior adjudication. The Court incorporates by reference the June 2, 1995, Opinion, a copy of which is attached.

First, plaintiffs declare that the issues raised in this case are not issues resolved in the state court action. Plaintiffs contend that the elements of the state common-law

fraud claim and the RICO claim are different and conclude that the evidence necessary to prove the two claims are not the same. In the June 2, 1995, Opinion, the Court rejected this argument, finding that "[p)laintiffs' RICO claim arises in part out of the same cause of action as their state law fraud claim" and that plaintiffs' "state law fraud and RICO claims are based on the same cause of action--defendant's allegedly fraudulent representations to them." June 2, 1995, Opinion at 3, 3 n. 1. The Court declines to alter its ruling on this point.

Second, plaintiffs argue that they could not have raised their RICO claim in state court. previously, plaintiffs argued that they learned of the potential for a RICO action in May 1993. Plaintiffs now assert that their prior statement was erroneous and that, in fact, they became aware of facts upon which to base a RICO action in September 1993. Plaintiffs argue that they were unable to "digest" this information until after the state court granted defendant's motion for summary disposition in February 1994.

In the June 2, 1995, Opinion, the Court found, based upon plaintiffs' briefing, that their RICO claim accrued in May 1993. The Court found that between May 1993 and February 1994, when the state court case initially con-cluded, plaintiffs had time in which to move to amend their complaint to add a RICO claim. Even accepting plaintiffs' new argument that the RICO claim did not accrue until the end of September 1993, the Court finds that plaintiffs had ample

time in which to analyze the discovery information and move to amend their complaint to add a RICO claim. As discussed in the June 2, 1995, Opinion, plaintiffs have failed to demonstrate that a motion to amend would have been futile. Accordingly, the Court again concludes that plaintiffs could have attempted to litigate their RICO claim in state court, but that they simply did not do so.

III.

For the reasons set forth above and in the June 2, 1995, Opinion, the Court finds that plaintiffs' RICO claim is barred by the state court adjudication. **The Court therefore will grant defendant's motion for summary judgment.**

s/s_____
BENJAMIN F. GIBSON
SENIOR U.S. DISTRICT JUDGE

Dated: May 7, 1998

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE TAYLOR GROUP, et al., **File No. 1:94-CV-600**

Plaintiffs, **Hon. Benjamin F. Gibson**

v.

ANR STORAGE COMPANY, **JUDGMENT**

Defendant.
_____/

At a session of the Court held in and for said District and Division, in the City of Grand Rapids, Michigan, this 7th day of May, 1998.

PRESENT: THE HONORABLE BENJAMIN F. GIBSON, SENIOR UNITED STATES DISTRICT JUDGE

In accordance with the Opinion entered this date,

IT IS HEREBY ORDERED that ANR Storage Company's motion for summary judgment (pleading no. 104) is GRANTED.

IT IS FURTHER ORDERED that judgment is entered in favor of defendant ANR Storage Company.

IT IS SO ORDERED.

/s/_____
BENJAMIN F. GIBSON
SENIOR U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE TAYLOR GROUP, et al.,	**File No. 94-CV-600**
Plaintiffs,	**Hon. Benjamin F. Gibson**
v.	
ANR STORAGE COMPANY,	**ORDER DENYING PLAINTIFFS' MOTION TO AMEND COMPLAINT**
Defendant.	
_____/	

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_____/

A hearing was held on Plaintiffs' Motion to Amend Complaint on Wednesday, July 2, 1997, at 9:30 a.m. at the

Federal Building in Grand Rapids, Michigan. The Court considered the pleadings filed by the parties except those submitted by Amoco and oral argument presented at the hearing. For the reasons stated on the record during the hearing on this matter, Plaintiffs' motion is DENIED.

Dated: July 14, 1997 /s/_____
Hon. Hugh W. Brenneman, Jr.
United States Magistrate Judge

APPROVED AS TO FORM FOR ENTRY:

/s/_____
Richard P. Carroll (P-38807)
Attorneys for Plaintiffs

/s/_____
John M. DeVries (P-12732)
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TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART I. CRIMES

CHAPTER 96. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

18 USCS § 1961 (2002)

§ 1961. Definitions

As used in this chapter [*18 USCS § § 1961* et seq.]--

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act [*21 USCS § 802]),* which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section

1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318

(relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) an act which is indictable under title *29, United States Code, section 186* (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act [*21 USCS § 802]),* punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 [*8 USCS § 1324]* (relating to bringing in and harboring certain aliens), section 277 [*8 USCS § 1327]* (relating to aiding or assisting certain aliens to enter the United States), or section 278 [*8 USCS § 1328]* (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter [*18 USCS § § 1961* et seq.];

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter [*18 USCS § § 1961* et seq.] or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter [*18 USCS § § 1961* et seq.];

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter [*18 USCS § § 1961* et seq.]. Any department or agency so designated may use in investigations authorized by this chapter [*18 USCS § § 1961* et seq.] either the investigative provisions of this chapter [*18 USCS § § 1961* et seq.] or the investigative power of such department or agency otherwise conferred by law.

HISTORY: (Added Oct. 15, 1970, P.L. 91-452, Title IX, § 901(a), 84 Stat. 941; Nov. 2, 1978, P.L. 95-575, § 3(c), 92 Stat. 2465; Nov. 6, 1978, P.L. 95-598, Title III, § 314(g), 92

Stat. 2677; Oct. 12, 1984, P.L. 98-473, Title II, Ch IX, § 901(g), Ch X, Part N, § 1020, 98 Stat. 2136, 2143; Oct. 25, 1984, P.L. 98-547, Title II, § 205(1), (2), 98 Stat. 2770; Oct. 27, 1986, P.L. 99-570, Title I, Subtitle H, § 1365(b), 100 Stat. 3207-35; Nov. 10, 1986, P.L. 99-646, § 50(a), 100 Stat. 3605; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle B, § § 7013, 7020(c), 7032, 7054, Subtitle N, Ch 1, § 7514, 102 Stat. 4395, 4396, 4398, 4402, 4489; Aug. 9, 1989, P.L. 101-73, Title IX, Subtitle F, § 968, 103 Stat. 506.)

(As amended Nov. 29, 1990, P.L. 101-647, Title XXXV, § 3560, 104 Stat. 4927; Sept. 13, 1994, P.L. 103-322, Title IX, Subtitle A, § 90104, Title XVI, § 160001(f), Title XXXIII, § 330022(1), 108 Stat. 1987, 2037, 2051; Oct. 22, 1994, P.L. 103-394, Title III, § 312(b), 108 Stat. 4140; April 24, 1996, P.L. 104-132, Title IV, Subtitle D, § 433, 110 Stat. 1274; July 2, 1996, P.L. 104-153, § 3, 110 Stat. 1386; Sept. 30, 1996, P.L. 104-208, Div C, Title II, Subtitle A, § 202, 110 Stat. 3009-565; Oct. 11, 1996, P.L. 104-294, Title VI, § § 601(b)(3), (i)(3), 604(b)(6), 110 Stat. 3499, 3501, 3506; Oct. 26, 2001, P.L. 107-56, Title VIII, § 813, 115 Stat. 382.)

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART I. CRIMES

CHAPTER 96. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

18 USCS § 1964 (2002)

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor

in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter [*18 USCS § § 1961* et seq.] shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

HISTORY: (Added Oct. 15, 1970, P.L. 91-452, Title IX, § 901(a), 84 Stat. 943; Nov. 8, 1984, P.L. 98-620, Title IV, Subtitle A, § 402(24)(A), 98 Stat. 3359.)
(As amended Dec. 22, 1995, P.L. 104-67, Title I, § 107, 109 Stat. 758.)

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

PART IV. JURISDICTION AND VENUE

CHAPTER 81. SUPREME COURT

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

28 USCS § 1254 (2002)

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

HISTORY: (June 25, 1948, ch 646, § 1, 62 Stat. 928; June 27, 1988, P.L. 100-352, § 2(a), (b), 102 Stat. 662.)

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

PART IV. JURISDICTION AND VENUE

CHAPTER 85. DISTRICT COURTS; JURISDICTION

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

28 USCS § 1331 (2002)

THE CASE NOTES SEGMENT OF THIS DOCUMENT HAS BEEN SPLIT INTO 2 DOCUMENTS.
THIS IS PART 1.
USE THE BROWSE FEATURE TO REVIEW THE OTHER PART(S).

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

HISTORY: (June 25, 1948, ch 646, § 1, 62 Stat. 930; July 25, 1958, P.L. 85-554, § 1, 72 Stat. 415; Oct. 21, 1976, P.L. 94-574, § 2, 90 Stat. 2721; Dec. 1, 1980, P.L. 96-486, § 2(a), 94 Stat. 2369.)

FEDERAL RULES OF CIVIL PROCEDURE

VII. JUDGMENT

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

USCS Fed Rules Civ Proc R 56 (2002)

Review expert commentary from The National Institute for Trial Advocacy
Review Court Orders which may amend this Rule.

THE CASE NOTES SEGMENT OF THIS DOCUMENT HAS BEEN SPLIT INTO 2 DOCUMENTS.
THIS IS PART 1.
USE THE BROWSE FEATURE TO REVIEW THE OTHER PART(S).

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or

certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

HISTORY: (Amended March 19, 1948; July 1, 1963; Aug. 1, 1987.)

RULE 2.116 SUMMARY DISPOSITION

(A) Judgement on Stipulated Facts.

(1) The parties to a civil action may submit and agreed-upon stipulation of facts to the court.

(2) If the parties have stipulated to facts sufficient to enable the court to render judgement in the action, the court shall do so.

(B) Motion.

(1) A party may move for dismissal of or judgement on all or part of a claim in accordance with this rule. A party against whom a defense is asserted may move under this rule for summary disposition of the defense. A request for dismissal without prejudice under MCL 600.2912c; MSA 27A.2912(3) must be made by motion under MCR 2.116 and MCR 2.119.

(2) A motion under this rule may be filed at any time consistent with subrule (D) and subrule (G)(1), but the hearing on a motion brought by a party asserting a claim shall not take place until at least 28 days after the opposing party was served with the pleading stating the claim.

(C) Grounds. The motion may be based on one or more of these grounds, and must specify the grounds on which it is based:

(1) The court lacks jurisdiction over the person or property.

(2) The process issued in the action was insufficient.

(3) The service of process was insufficient.

(4) The court lacks jurisdiction of the subject matter.

(5) The party asserting the claim lacks the legal capacity to sue.

(6) Another action has been initiated between the same parties involving the same claim.

(7) The claim is barred because of release, payment, prior judgement, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.

(8) The opposing party has failed to state a claim on which relief can be granted.

(9) The opposing party has failed to state a valid defense to the claim asserted against him or her.

(10) Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgement or partial judgement as a matter of law.

(D) Time to Raise Defenses and Objections. The grounds listed in subrule (C) must be raised as follows:

(1) The grounds listed in subrule (C)(1),(2), and (3)

must be raised in a party's first motion under this rule or in the party's responsive pleading, whichever is filed first, or they are waived.

(2) The grounds listed in subrule (C)(5),(6), and (7) must be raised in a party's responsive pleading, unless the grounds are stated in a motion filed under this rule prior to the party's first responsive pleading. Amendment of a responsive pleading is governed by MCR 2.118.

(3) The grounds listed in subrule (C)(4), (8), (9), and (10) may be raised at any time.

(E) Consolidation; Successive Motions.

(1) A party may combine in a single motion as many defenses or objections as the party has based upon any of the grounds enumerated in this rule.

(2) No defense or objection is waived by being joined with one or more other defenses or objections.

(3) A party may file more than one motion under this rule, subject to the provisions of subrule (F).

(F) Motion or Affidavit Filed in Bad Faith. A party or an attorney found by the court to have files a motion or an affidavit in violation of the provisions of MCR 2.114 may, in addition to the imposition of other penalties prescribed by that rule, be found guilty of contempt.

(G) Affidavits; Hearing.

(1) Except as otherwise provided in this subrule, MCR 2.119 applies to motions brought under this rule.

(a) Unless a different period is set by the court,

(i) a written motion under this rule with supporting brief and any affidavits must be filed and served at least 21 days before the time set for the hearing, and

(ii) any response to the motion (including brief and any affidavits) must be filed and served at least 7 days before the hearing.

(b) If the court sets a different time for filing and serving a motion or a response, its authorization must be endorsed in writing on the face of the notice of hearing or made by separate order.

(c) A copy of a motion or response (including brief and any affidavits) filed under this rule must be provided by counsel to the office of the judge hearing the motion. The judge's copy must be clearly marked JUDGE'S COPY on the cover sheet; that notation may be handwritten.

(2) Except as to a motion based on a subrule (C)(8) or (9), affidavits, depositions, admissions or other documentary evidence may be submitted by a party to support or oppose the grounds asserted in the motion.

(3) Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required.

(a) when the grounds asserted do not appear on the face of the pleadings, or

(b) when judgment is sought based on subrule (C)(10).

(4) A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

(5) The affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10). Only the pleadings may be considered when the motion is based on subrule (C)(8) or (9).

(6) Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)-(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion.

(H) Affidavits Unavailable.

(1) A party may show by affidavit that the facts necessary to support the party's position cannot be presented because the facts are known only to persons whose affidavits the party cannot procure. The affidavit must:

(a) name these persons and state why their testimony cannot be procured, and

(b) state the nature of the probable testimony of these persons and the reason for the party's belief that these persons would testify to those facts.

(2) When this kind of affidavit is filed, the court may enter an appropriate order, including and order

(a) denying the motion, or

(b) allowing additional time to permit the affidavit to be supported by further affidavits, or by depositions, answers to interrogatories, or other discovery.

(I) Disposition by Court; Immediate Trial

(1) If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay.

(2) If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court

may render judgment in favor of the opposing party .

(3) A court may, under proper circumstances, order immediate trial to resolve any disputed issue of fact, and judgment may be entered forthwith if the proofs show that a party is entitled to judgment on the facts as determined by the court. An immediate trial may be ordered if the grounds asserted are based on subrules (C)(1) through (C)(6), or if the motion is based on subrule (C)(7) and a jury trial as of right has not been demanded on or before the date set for hearing. If the motion is based on subrule (C)(7) and a jury trial has been demanded, the court may order immediate trial, but must afford the parties a jury trial as to issues raised by the motion as to which there is a right to trial by jury.

(4) The court may postpone until trial the hearing and decision on a matter involving disputed issues of fact brought before it under this rule.

(5) If the grounds asserted are based on subrule (C)(8); (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified.

(J) Motion Denied; Case Not Fully Adjudicated on Motion.

(1) If a motion under this rule is denied, or if the decision does not dispose of the entire action or grant all the relief demanded, the action must proceed to final judgment. The court may:

(a) set the time for further pleadings or amendments required;

(b) examine the evidence before it and, by questioning the attorneys, ascertain what material facts are without substantial controversy, including the extent to which damages are not disputed; and

(c) set the date on which all discovery must be completed.

(2) A party aggrieved by a decision of the court entered under this rule may:

(a) seek interlocutory leave to appeal as provided for by these rules;

(b) claim an immediate appeal as of right if the judgment entered by the court constitutes a final judgment under MCR 2.604(B); or

(c) proceed to final judgment and raise errors of the court committed under this rule in an appeal taken from final judgment.